In the Supreme Court of the United States

No. 77-1814

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

V.

PETER SMITH
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION

The Commonwealth of Pennsylvania respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court affirming the Pennsylvania Superior Court is reported at _____ Pa. _____, _____ A.2d _____(1978) and is printed as Appendix A. The opinion of the Pennsylvania Superior Court reversing the trial court is reported at _____ Pa. Superior Ct. _____, 378 A.2d 1015 (1977), and is printed as Appendix B. The two opinions of the trial court are printed as Appendix C and D; Appendix C being the local opinion and order of court overruling motions for a new trial and in arrest of judgment, and reported at 26 Cumberland Law Journal 311, and Appendix D being the opinion of the local court overruling suppression motions.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 27, 1978. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3) and by United States Supreme Court Rule 19 §1 (a).

QUESTIONS PRESENTED

I.

Whether in the search warrant issued in this case, the assertion that the affiant had personally been involved in gambling activity with defendants, identified in the warrant by first and last names, was a material misstatement where the police had dealt with the defendants over the telephone using only first names and had learned the last names of the defendant from a reliable informant?

II.

Whether, assuming **arguendo**, the existence of a misstatement concerning the use by defendants' of their last names in their dealings with police, such a misstatement vitiates issuance of a search warrant, where the warrant affidavit contains sufficient probable cause, apart from the misstatements?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the above-entitled Petition involves is as follows:

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searched and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE FACTS

The respondent was arrested on November 22, 1975, as a result of a State Police search of his residence located on Mounted Route, Enola, Hampden Township, Cumberland County, Pennsylvania. During this search substantial evidence was found of a bookmaking and poolselling operation being conducted therein. Specifically, in one room of the house numerous records pertaining to this illegal activity were found and an individual, subsequently identified as John Theodore Smith, was apprehended while engaged in the task of receiving telephoned bets. Blanche Smith, wife of the respondent, was also arrested during the search. The respondent was not found on the premises.

The search warrant in question was issued by a District Magistrate on November 21, 1975. The facts and circumstances upon which the District Magistrate based a finding of probable cause to search were set forth in the warrant application by Trooper George Wynn, the affiant and arresting officer. This information provided marked the culmination of an undercover investigation which spanned the period of September 27 to November 21, 1975. The test of the search warrant in support of probable cause and the subject of the case at issue is as follows:

> "The affiant personally placed horse bets by calling 717—732-0950 on 22, 29, 30, & 31 October, 1, 3, 5, & 11 November 1975. The person(s) taking the bets identified themselves as being Pete SMITH, Blanch SMITH, & John SMITH. The bets were accepted by the aforementioned parties under the name of GEORGE FLECK with the stipulation that settlement be made with Robert Harry LONG of Carlisle to cover the cost of the bets. The monies expended on horse bets placed by telephone (717—732-0950) totaled $160.00. Total winnings totaled $95.00. Between October 2, 1975 & November 19, 1975 the affiant personally was involved in playing football tickets with Pete & John SMITH through Robert Harry LONG of Carlisle,

> Penna. LONG indicated that the tickets were being obtained from Pete SMITH in Enola on Monday or Tuesday evenings and the stubs and monies were being returned to Pete SMITH on Saturday mornings. On October 31, 1975 the affiant personally talked to John SMITH on the telephone (717—732-0950) and discussed football stub number 19912 that was played through Robert Harry LONG on 24 October 1975. John SMITH had the stub in his possession and read the teams played back to the affiant.
>
> Stub #19912 was given to Robert Harry LONG on 24 October 1975 and was turned in on 25 October 1975.
>
> The affiant became acquainted with Pete, John, & Blanch SMITH through Robert Harry LONG. LONG indicated that Pete SMITH was running the operation and Blanch & John answered the phones for Pete. LONG gave the affiant telephone number 717—732-0950 and indicated that Pete or John can be contacted at that number. LONG indicated that he would clear it through Pete SMITH so the affiant would be able to call the bets in under the name of George FLECK. The affiant believes LONG since he is incriminating himself by indicating that Pete SMITH is the person running the gambling operation and that through LONG the affiant has been able to place bets by telephone with Pete SMITH.
>
> The affiant has heard the voices of John & Pete SMITH on numerous occasions during the investigation that began 27 September 1975 & 11 November 1975. The affiant positively identified the voices of John & Pete SMITH as being the person(s) that accepted the horse bets on the telephone. In addition to the affiant identifying the voices the individuals verbally identified themselves when talking to the affiant on the telephone.
>
> Bell Telephone records indicate that telephone 717—732-0950 to be located at the SMITH residence under the

listing of S. M. GRAEFF, C/O Pete SMITH, Mounted Route, Enola, Penna.

The affiant concludes that Bookmaking & Poolselling paraphernalia, record & monies are located at the herein described premises under the control of Pete, Blanch, & John SMITH all of which are subject to seizure as being in violation of Section 5514 of the CRIMES CODE. This warrant is to include the search of all persons on the herein described premises to prevent the destruction & removal of evidence.

On November 2[illegible], 1975 the affiant met with Robert Harry LONG at his residence in Carlisle Borough at which time LONG accepted football bets in the amount of $7.00. This affiant gave LONG one (1) ten dollar bill, serial #E46409121B to cover the cost of the bets and LONG gave the affiant $3.00 in paper currency as change. The bets were placed on ticket numbers 36438, 36439, 36440, 36441, & 36443. LONG indicated that he will be giving the tickets to Pete tomorrow morning in Enola."

An Application for Suppression of Evidence was filed by the respondent on April 30, 1976. A hearing on this application was held before the President Judge of Cumberland County, Pennsylvania, Dale F. Shughart, on May 5, 1976, at which time the respondent challenged the sufficiency of the search warrant by arguing that the warrant affidavit contained several material misrepresentations of fact.

In an Order dated May 5, 1976, the Court overruled the respondent's Motion to Suppress and affirmed the validity of the search warrant. In support of its Order, the Court cited and relied upon an Opinion filed February 9, 1976, in Commonwealth v. Blanche Smith and John Theodore Smith at 43 and 44 Criminal, 1976. This separate opinion earlier disposed of the identical issue raised by the respondent. (See Appendix D).

On May 11, 1976, following a jury trial specially presided over by the Honorable John C. Dowling of the Twelfth Judicial District of

Pennsylvania, the respondent was found guilty of eight counts of knowingly permitting premises owned or occupied by him to be used for bookmaking. The jury acquitted the respondent of a separate charge of bookmaking and poolselling.

On May 12, 1976, Motions for New Trial and In Arrest of Judgment were timely filed. On June 8, 1976, the respondent filed a Supplemental Motion for New Trial.

In an Opinion and Order of Court dated September 10, 1976, the respondent's post-trial motions were overruled. (See Appendix C).

Subsequently, on November 29, 1976, the respondent was sentenced by Judge Dowling. There followed an appeal to the Superior Court of Pennsylvania.

The Superior Court of Pennsylvania in its Opinion dated October 6, 1977, sustained respondent's motion and remanded the case for a new trial. (See Appendix B).

The Supreme Court of Pennsylvania denied the Commonwealth's Petition for Allocatur in its order dated January 27, 1978. (See Appendix A).

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO ADDRESS THE QUESTION OF WHAT CONSTITUTES MISSTATEMENTS IN SEARCH WARRANT AFFIDAVITS AND THE STANDARDS OF REVIEW TO BE APPLIED IN DETERMINING THE EXISTENCE OF MISSTATEMENTS IN AFFIDAVITS IN SUPPORT OF PROBABLE CAUSE TO SEARCH REQUIRED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the text of the Pennsylvania Superior Court Order, that Court found the affiant's assertion in the search warrant that he "became acquainted with Pete, John, & Blanche SMITH through Robert Harry LONG," and that the affiant was "personally. . .involved in playing football tickets with Pete & John SMITH through Robert Harry LONG" to be material misrepresentations.

The suppression testimony indicated clearly that the affiant, Trooper Wynn, became involved in placing football bets with persons by the name of Pete, John and Blanch.

The testimony further bore out the assertions in the warrant that the trooper developed this relationship with these three persons through one Harry Long. He freely admits that the defendants never personally introduced themselves to him using a last name of Smith, and that he became familiar with these persons and their voices by the use of the telephone.

The United States Supreme Court has sought to discourage a grudging attitude toward search warrants. The requisites for search warrants were treated in the case of **United States v. Harris**, 403 U.S.

573 (1971). In that case, on page 2079, Chief Justice Burger quoted with approval from **United States v. Ventresca**, 380 U.S. 102 (1965), the following language:

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S. at 108, 85 S. Ct. at 746.

In derogation of these principles, the Supreme and Superior Courts of Pennsylvania chose to interpret the words "became acquainted" as being indicative of a personal relationship only, even though it is clear that the words are susceptible to a different interpretation. One can become "acquainted" with another in a number of different ways. We submit that one such way is that referenced by the affiant in this case; namely, that he placed bets over the phone with three specified persons who referred to themselves by their first names, but whose last names were known to him by an independent and reliable third party. Accordingly, we would strongly suggest that the referenced assertions by the affiant are not misstatements. The entire text of the search warrant ought to have been studied, with all aspects being taken together to determine the existence of any misstatements.

The Pennsylvania Superior Court concentrated on a handful of select phrases of the warrant affidavit to undermine its integrity. In interpreting those phrases the Court applied standards of interpretation inconsistent with those suggested in **United States v.**

Harris, **supra**., and **United States v. Ventresca**, **supra**. It is incumbent upon the Courts, when reviewing the language of warrant affidavits, to consider the various meanings of words as they are shared by lay persons. Without such a standard the previously enunciated intent of the United States Supreme Court will be without force and effect. We would ask the Supreme Court of the United States to adopt a standard of interpretation in these matters mandating the liberal construction of affidavit language, preferring the reconciliation of allegations in the affidavit, thereby favoring the integrity of warrants.

II

THIS CASE PERMITS THE COURT, WITH A NARROW AND PRECISE FACTUAL SITUATION, TO REVIEW THE IMPACT OF MISSTATEMENTS, IN SEARCH WARRANT AFFIDAVITS, ON THE DETERMINATION OF THE EXISTENCE OF PROBABLE CAUSE WHERE THERE ARE SUFFICIENT FACTS IN THE AFFIDAVIT EXCLUDING THE MISSTATEMENTS, WHICH WOULD SUPPORT PROBABLE CAUSE TO SEARCH, AS REQUIRED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner has no quarrel with the right of the respondent to challenge the veracity of facts recited in the warrant. Nonetheless, in Pennsylvania the Courts have made clear the fact that this prerogative is **not** premised on an assumption of perjury by law enforcement officials. **Commonwealth v. Hall,** 451 Pa. 201, 302 A.2d 342 at page 344 (1973). On the other hand it is the clear desire of the case of **Commonwealth v. D'Angelo**, 437 Pa. 331, 263 A.2d 441 (1970), cited by the Superior Court in its order, to discourage the police from exaggerating or expanding on facts given to the magistrate merely for the purpose of meeting the probable cause requirement.

As recently as the case of **Commonwealth v. Wiggins**, 239 Pa. Superior Ct. 256, 361 A.2d 750, at page 752 (1976), a case involving probable cause to arrest, the Pennsylvania Superior Court has suggested that a material fact is one without which probable cause would not exist. This interpretation of a "material fact" is sound as consistent with the desire of the Courts to encourage search warrants, along with the premise that misstatements are not normally based on intentional perjury. Without such an understanding, the Courts of this land would subject non-lawyer police officers to the most stringent standards of legal draftsmanship. This is clearly not the intent of the United States Supreme Court. Similar views were clearly

expressed by the Pennsylvania Superior Court itself in **Commonwealth v. Jones,** 229 Superior Ct. 224, 323 A.2d 879 (1974).

In the matter at bar, however, the Superior Court of Pennsylvania considered only statements which it considered to be misstatements, and gave no consideration to the remaining body of the search warrant. The posture of this case reflects the lack of a uniform policy in these matters. Our research has revealed no case in which the United States Supreme Court has spoken to the issue of the effect of misstatements in search warrant affidavits. The result of this case shows the confusion existing in the Pennsylvania courts as regards this question. The resolution of this matter is fundamental to the proper understanding of the probable cause requirements of the Fourth Amendment to the United States Constitution.

Judge Shughart, in his initial opinion in this matter, referred himself directly to this question. The Court of Common Pleas, assuming **arguendo** that the respondent's position was true, in viewing the affidavit without the objectionable material, was satisfied, nonetheless, that enough information remained to support the finding of probable cause. The Court said at page 3 of its Opinion:

> The affiant stated that on eight separate occasions over a three week period he had personally placed horse bets by calling (717) 732-0959. The persons who answered the calls identified themselves as Pete, Blanche, and John. According to telephone records, the phone number through which the calls were accepted was located at the premises to be searched, listed under the name of S. M. Graeff, c/o Pete Smith. These facts alone, which are not challenged by the defendant, are sufficient in our view to constitute probable cause to search, especially when we remember that when evaluating a search warrant, we are dealing with probabilities and not with a prima facie showing of criminal activity. **Commonwealth v. Williams**, 236 Pa. Superior Ct. 184, 345 A.2d 267 (1975). Compare the search warrant here with that upheld in **Commonwealth v. DeLuca**, 230 Pa. Superior Ct. 390, 326 A.2d 463 (1974).

Our local Court, however, even though satisfied that the affidavit was sufficient without considering alleged misstated information obtained from the informant, went on to discuss the alleged misstatement that Long was an informant and rejected that assertion, indicating that it was, indeed, not a misstatement. The Court notes on page 4 of its Opinion:

> In reaching this conclusion, we have found that the oft-cited test enunciated in **Aguilar v. Texas**, 378 U.S. 108, 114-15 (1964), was met:
>
> > Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the objects to be seized were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant. . .was "credible" or his information "reliable." (Citations omitted).

The first prong of this test is met by the substantially detailed description of the gambling operation provided by the informant as well as by the clear implication that he gained his information through personal observation, since he had admittedly participated in the operation. **Commonwealth v. Soychak**, 221 Pa. Superior Ct. 458, 289 A.2d 119 (1972). As to the second prong of the test, establishing the informant's reliability, we conclude that the independent corroboration of substantially all of the information supplied by the informant by the police investigation sufficed. **See United States v. Harris,** 403 U.S. 573 (1971); **Spinelli v. United States**, **supra** at 644; **Commonwealth v. Archer**, 238 Pa. Superior Ct. 103, 109, 352 A.2d 483 (1975). When the affidavit is read with this information in addition to the firsthand information of the affiant, it clearly supports a finding of probable cause.

Reasons for Granting the Writ

The cases afore cited, compel us to examine the nature of the alleged misstatements, as they relate to the inability of a magistrate to reach an impartial and detached judgment.

In Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970), the only information in the warrant, linking the defendant to the crime, was a clearly misleading statement that **D'Angelo** had been identified as the robber. There is little wonder that these statements were found to have been so misleading as to taint the search, particularly since the probable cause was based only on the identification. In this case, however, we have several statements, alleged to be inaccurate by the respondent the sole import of which is that the officer knew the last name of the respondent to be "SMITH".

Far more important averments in the affidavit remain entirely uncontroverted. Those facts are that the officer engaged in regularly placing bets, given a definite phone number, with persons by the name of Pete, John and Blanch. The phone number was traced to a specific dwelling home. Further, the officer worked in an undercover fashion and with a man who was not aware of the affiant's identity as a police officer, in placing bets with the respondent, whose last name of "SMITH" he learned from, among other sources, the Bell Telephone Company.

Even disregarding the "misstatements" in their entirety, this warrant is replete with facts supporting the issuance thereof. The failure to review this case would leave standing on the books, an opinion subjecting police officers to the most technical of requirements in the completion of search warrant affidavits.

Conclusion

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Edgar B. Bayley
District Attorney
Cumberland County, Pennsylvania
Attorney for Petitioner

Appendix A

APPENDIX A

[_____ Pa. _____, A.2d _____(1978)]

IN THE SUPREME COURT OF
PENNSYLVANIA
Middle District

No. 3258 Allocatur Docket, 1977

COMMONWEALTH OF PENNSYLVANIA

Appellee

V.

PETER SMITH

Appellant

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of an Appeal From the Order of the Superior Court Docketed at No. 505 October Term, 1977, Vacating Judgment of Sentence and Remanding Case for A New Trial.

OPINION

January 27, 1978, Petition denied. PER CURIAM.

Appendix B

APPENDIX B

[Pa. Superior Ct. 378 A.2d 1015 (1977)]

IN THE SUPERIOR COURT OF
PENNSYLVANIA
Eastern District

No. 505 October Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

Peter Smith

Appellant

Appeal from the Order of Sentence of the Court of Common Pleas of Cumberland County, Pennsylvania, to No. 229 Criminal Division, 1976.

OPINION BY SPAETH, J.:

On April 21, 1976, an indictment was returned by the Grand Jury of Cumberland County charging appellant, in one count, of engaging in pool selling and bookmaking, and in eight counts, of permitting pool selling and bookmaking upon premises owned or occupied by him Appellant filed a motion to suppress evidence seized

pursuant to a search warrant. The motion was denied, and on May 11, 1976, appellant was found guilty by a jury on all eight counts of permitting pool selling and bookmaking, but was acquitted on the one count of engaging in pool selling and bookmaking. Post-trial motions in arrest of judgment and for a new trial were filed and denied, and on November 29, 1976, appellant was sentenced on each of the eight counts to pay a fine of $2,000 and to serve a term in prison of two and one-half years to five years, the sentences to run concurrently. This appeal followed.

I

Appellant argues that his motion in arrest of judgment should have been granted because the evidence was insufficient to prove beyond a reasonable doubt that he had knowledge that gambling activities were taking place on his premises.

Section 5514 of the Crimes Code, Act of Dec. 6, 1972, P.L. _____, No. 334 §1, eff. June 6, 1973, provides in pertinent part that:

> A person is guilty of a misdemeanor of the first degree if he:
>
> . . .
>
> (5) being the owner, lessee, or occupant of any premises, knowlingly permits or suffers the same, to be used or occupied for any [pool selling or bookmaking purposes].

There is no dispute that the evidence established that appellant owned the premises where the gambling paraphernalia was found and the telephone over which bets were being taken was located. Regarding the evidence that appellant had knowingly permitted the premises to be used in this manner, the lower court said:

> [Appellant's knowledge] was established almost entirely by circumstantial evidence. It consisted of evidence that [appellant's] wife and another relative were identified as the persons the affiant spoke to when he placed bets. The activity was shown to be continuing in nature. The bail piece executed by [appellant] . . . and the testimony of [appellant's] son showed [appellant] resided on the property. In addition the bail piece and the testimony of the County Recorder of Deeds established [appellant] as the sole owner of the property. Finally, the letter addressed to [appellant] and found in the room where the illegal activity was carried on among the bookmaking records would strongly indicate that he had been in the room while it was being put to its unlawful use.
>
> Slip opinion at 9-10.

The only direct evidence of appellant's knowledge was the testimony of Trooper Wynn that on one of the occasions when he called the telephone located in appellant's premises to place a bet the person answering said, "This is Pete". N.T. at 12.

> In testing the sufficiency of the evidence, we must review the testimony in a light most favorable to the verdict winner. . . . In so doing, we will accept as true the Commonweath's evidence and all reasonable inferences arising therefrom. . . . The test of the sufficiency of the evidence is whether, accepting as true all evidence, regardless of whether it is direct or circumstantial, upon which, if believed, the fact finder could properly have based his verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. . . .
>
> **Commonwealth v. Young**, _____ Pa. Superior Ct. _____; _____, 335 A.2d 498, 500 (1975) (citations omitted).

Reviewing the testimony in this light, we conclude that the jury could reasonably infer that appellant knew that illegal gambling activities were being conducted on his premises. The lower court therefore properly denied appellant's motion in arrest of judgment.

Appendix B

II

Appellant first argues that he is entitled to a new trial because hearsay testimony was improperly admitted over repeated objection. The testimony concerned statements by a Robert Long to Trooper Wynn to the effect that by calling a specific telephone number, the trooper could place bets. N.T. at 6-8. As the lower court correctly held, this testimony was not hearsay because it was not offered to show that what Long said was true but only to show that he said it, **Commonwealth v. Sampson**, 454 Pa. 215, 311 A.2d 624 (1973); **Commonwealth v. Jacob,** 445 Pa. 364, 284 A.2d 717 (1971), thereby explaining the trooper's subsequent action, **Commonwealth v. Tseiepsis,** 198 Pa. Superior Ct. 449, 452, ____ A.2d ____, ____(1962).

Appellant next argues that he is entitled to a new trial because his motion to suppress was improperly denied. Appellant specifically alleges that material misrepresentations contained in the affidavit in support of the warrant prevented the issuing authority from making an objective and detached determination that probable cause existed as required by the Fourth Amendment of the United States Constitution made applicable to the states through the Due Process Clause of the Fourteenth Amendment. **Spinelli v. United States**, 393 U.S. 410 (1969); **Aguilar v. Texas,** 378 U.S. 108 (1964); **Mapp v. Ohio,** 367 U.S. 643 (1961).

In the affidavit the affiant states that he "became acquainted with Pete, John & Blanch [**sic**] SMITH through Robert Harry LONG."[1] and that he "personally was involved in playing football tickets with Pete & John SMITH through Robert Harry LONG." The ordinary interpretation of these words is that on Long's introduction the affiant met Pete, John, and Blanche Smith face-to-face. However, at the suppression hearing the affiant testified that he never met appellant, N.T. at 13, and that these averments of personal "acquaint[ance]" were based on what Robert Long had told him, N.T. at 8-11.

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1 John and Blanche Smith are respectively appellant's nephew and wife; they were tried in separate proceedings.

Appendix B

Given this testimony, our decision is controlled by **Commonwealth v. D'Angelo,** 437 Pa. 331, 263 A.2d 411 (1970). There the facts were these. After viewing a line-up, the victim of a robbery told the police that he was not sure whether D'Angelo was the robber. The next day the police obtained a warrant to search D'Angelo's residence, stating in the affidavit of probable cause that D'Angelo had been "identified" as the robber but that the victim "would not say positively that D'Angelo was the person unless he could view the clothing that was worn by the robber." Pursuant to the warrant the police seized a white turtleneck sweater. Upon being shown the sweater the victim for the first time told the police that D'Angelo was the robber. This court affirmed **per curiam**, HOFFMAN, J., filing a dissenting opinion in which SPAULDING, J., joined. The Supreme Court granted allocatur and reversed. Said the Court:

> It is clear from the record that the affidavit filed with the magistrate which caused the search warrant to issue was incorrect and misleading when it stated, "D'Angelo has been **identified** as the person who entered Fines [**sic**] store. . . .", for the Commonwealth's own evidence establishes that as of that moment this was not the case. . . . This, in our view, so tainted the search that the evidentiary use of the fruits thereof violated due process of law and, in itself, requires a reversal of the conviction and judgment.
>
> **Id.** at 336, 263 A.2d at _____.

Furthermore, the Court explained, this disposition was required even though

> the information supplied the magistrate in the affidavit, when considered in its entirety, was unquestionably sufficient to warrant a reasonable man in the conclusion that probable cause existed to issue the search warrant. But, this information was untrue and misleading in one very important respect. Moreover, the testimony at trial supports no other conclusion but that the police who supplied the information knew it was not in accord with the then existing facts. Under such circumstances, the

warrant was invalid and the use of evidence resulting from the search based thereon was constitutionally proscribed. . . . To rule otherwise would permit the police in every case to exaggerate or to expand on the facts given to the magistrate merely for the purpose of meeting the probable cause requirement, thus precluding a detached and objective determination.

Id. at 337-38, 263 A.2d at ____.

So here, the affidavit was untrue and misleading, and known to be so, in important respects.[2] It thus precluded a detached and objective determination of probable cause.

The judgment of sentence is vacated and the case is remanded for a new trial.

PRICE, J., did not participate in the consideration or disposition of this case.

WATKINS, P.J., and VAN DER VOORT, J., dissent.

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2 There were other misleading statements in addition to those discussed above. The affidavit stated that "[t]he person(s) taking the bets identified themselves as being Pete SMITH, Blanch [sic] SMITH, & John SMITH." At the suppression hearing the affiant testified that in fact no surnames were used. N.T. at 8. In the affidavit the affiant stated that he "positively identified the voices of John & Pete SMITH as being the person(s) that accepted the horse bets on the telephone." At the suppression hearing the affiant testified that he could not have positively identified appellant's voice except for the salutation, "This is Pete." N.T. at 14. Finally, in the affidavit the affiant stated that he believed the information Robert Long gave him in part because "he is incriminating himself by indicating that Pete SMITH is the person running the gambling operation." However, at the suppression hearing the affiant testified that Long was not an informant and was unaware that the affiant was a police officer. N.T. 11, 26.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Cumberland County be, and the same is hereby VACATED AND THE CASE IS REMANDED FOR A NEW TRIAL.

By the Court,

/s/ Charles A. Hoenstine
Prothenotary

Dated: October 6, 1977

APPENDIX C

[26 Cumberland Law Journal 311]

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 229 Criminal, 1976

COMMONWEALTH

v.

PETER SMITH

OPINION and ORDER OF COURT

The defendant was convicted after a jury trial on May 10 and 11, 1976, before the Honorable John C. Dowling, 12th Judicial District, specially presiding. Post trial motions are now before us for decision. A guilty verdict was returned on eight counts charging the defendant with knowlingly permitting premises owned or occupied by him to be used for bookmaking in violation of the Crimes Code, Act of December 6, 1972, P.L. 1482, §1, 18 Pa. C.S. §5514(5). On the ninth count, that of actually receiving or recording a bet, the jury found the defendant not guilty. In support of his motions, the defendant has raised a number of grounds, but upon careful analysis we conclude that the errors assigned are either harmless or non-existent and the motions must be denied.

The defendant's arguments divide into two distinct categories. The first deals with the sufficiency of the affidavit for the search warrant utilized in this case and the subsequent admission of seized articles at the trial. In the second category we find a number of alleged errors in the conduct of the trial itself. We shall deal first with the attack in the search warrant.

The affiant, operating undercover, accumulated information in the course of his investigation which led him to request a search warrant on November 21, 1975, for the premises on Mounted Route, Enola, in this county. District Justice Carl determined that there was sufficient probable cause and issued the warrant. When it was executed the next day, a substantial amount of bookmaking paraphernalia located in a bedroom of the house on the premises was confiscated. Blanche Smith, the defendant's wife, and John Theodore Smith, also apparently related to the defendant, were on the property at the time, but the defendant was not. The defendant filed a motion to suppress the evidence gathered during the search, and a hearing was held on May 5, 1976, before the Honorable Dale F. Shughart to dispose of the motion. An order denying the motion was entered the same day in which reference was made to a prior opinion involving the same search warrant. Assigning this decision as error, the defendant now urges the court to order a new trial.

The primary challenge against the search warrant is directed against the information provided to the magistrate as the basis for probable cause to search. In summary the defendant argues: (1) that there were material misrepresentations set forth in the affidavit which precluded a finding of probable cause; and (2) that a significant amount of the information contained in the affidavit could not be used by the magistrate to determine probable cause because it was provided by an informant whose reliability was not established. It is true that if there are material misrepresentations of fact without which probable cause cannot be found to exist, then the warrant will be declared defective. **Commonwealth v. Hall,** 451 Pa. 201, 302 A.2d 342 (1973); **Commonwealth v. Scavincky**, _____ Pa. Superior Ct. _____, 359 A.2d 449 (1976); **Commonwealth v. Jones,** 229 Pa. Superior Ct. 224, 323 A.2d 879 (1974). Likewise, if the reliability of

the informant has not been established, the information provided by him must not enter into the probable cause evaluation. **Spinelli v. Unites States,** 393 U.S. 410 (1969). Taking the defendant's arguments as true and viewing the affidavit without the objectionable material, we are nevertheless satisfied that enough information remains to support the finding of probable cause. The affiant stated that on eight separate occasions over a three week period he had personally placed horse bets by calling (717) 732-0950. The persons who answered the calls identified themselves as Pete, Blanche, and John. According to telephone records, the phone number through which the calls were accepted was located at the premises to be searched, listed under the name of S.M. Graeff, c/o Pete Smith. The facts alone, which are not challenged by the defendant, are sufficient in our view to constitute probable cause to search, especially when we remember that when evaluating a search warrant, we are dealing with probabilities and not with a prima facie showing of criminal activity. **Commonwealth v. Williams,** 236 Pa. Superior Ct. 184, 345 A.2d 267 (1975). Compare the search warrant here with that upheld in **Commonwealth v. DeLuca,** 230 Pa. Superior Ct. 390, 326 A.2d 463 (1974).

Although we are satisfied that the affidavit was sufficient without considering the information obtained from the informant, we are convinced that the data obtained from him in this case could be validly used in assessing the presence of probable cause. In reaching this conclusion, we have found that the oft-cited test enunciated in **Aguilar v. Texas,** 378 U.S. 108, 114-15 (1964), was met:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the objects to be seized were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant. . . was "credible" or his information "reliable." (Citations omitted).

The first prong of this test is met by the substantially detailed description of the gambling operation provided by the informant as

well as by the clear implication that he gained his information through personal observation, since he had admittedly participated in the operation. **Commonwealth v. Soychak,** 221 Pa. Superior Ct. 458, 289 A.2d 119 (1972). As to the second prong of the test, establishing the informant's reliability, we conclude that the independent corroboration of substantially all of the information supplied by the informant by the police investigation sufficed. **See United States v. Harris,** 403 U.S. 573 (1971); **Spinelli v. United States, supra** at 644; **Commonwealth v. Archer,** 238 Pa. Superior Ct. 103, 109, _____ A.2d _____ (1975). When the affidavit is read with this information in addition to the firsthand informatiom of the affiant, it clearly supports a finding of probable cause.

The other arguments presented in the motion to suppress--that some items seized were not listed in the complaint for the search warrant and that the defendant was not present when the warrant was executed--are without merit. The evidence seized under the instant search warrant was properly admissible at trial.

TRIAL ERRORS

The first witness presented by the Commonwealth at trial was the affiant, Trooper Wynn. He proceeded to testity to statements made to him by Robert Long, the informant. N.T. 6-8. At one point he stated that Long furnished him the telephone number, 732-0950, whereupon the defendant strenuously objected to the testimony as hearsay. A standing objection was granted the defendant as to "any statement that was given by Mr. Long which is absolutely hearsay." N.T. 8. That this objection was overruled is not assigned as error.

We are not persuaded that the testimony of Trooper Wynn to which the defendant objected was in fact hearsay because it was not offered to prove the truth of the matter asserted, i.e., that bets could be placed at the given phone number by following the procedure described. The real purpose of the testimony was to show that the statements were made to the trooper so as to explain the subsequent conduct of the officer in his investigation.

Testimony as to an out of court statement is not hearsay if offered to prove not that the statement was true, but that the statement was made. **Commonwealth v. Sampson,** 454 Pa. 215, 311 A.2d 624 (1973); **Commonwealth v. JACOB,** 445 Pa. 364, 284 A.2d 717 (1971); G. Henry, Pennsylvania Evidence, §441.

In **Commonwealth v. Tseiepis,** 198 Pa. Superior Ct. 449 (1962), county detectives went to defendant's business establishment as a result of a "tip" and observed activity which led to his arrest and conviction for operating a lottery. During the trial, defendant objected to the "tip" saying that it was hearsay. In sustaining the trial court's ruling that is was admissable, the court said:

> Likewise, evidence as to the reason action is taken is admissable, as an exception to the hearsay rule. The truth of the statement of the third person is immaterial; the fact of its being made is the important consideration. **Id.** at 452.

The defendant next argues that error was committed in receiving into evidence Commonwealth exhibits seven and eight. Exhibit seven is an envelope from the Pennsylvania Department of Revenue with a glassine window through which the name of the addressee is visible stamped on the letter inside. The address is Peter Smith, Mt. Rt., Enola, Pa.; the letter is dated August 15, 1975. Exhibit eight is another envelope simply addressed to Peter Smith at the same location. The defendant maintains that since it was shown that two different people named Pete Smith--the defendant and his son--had access to the premises involved, there was no way to ascertain to which Pete Smith the exhibits belonged. The letter which is a part of exhibit seven has stamped upon it a social security number. According to the testimony of Trooper Wynn, this number corresponds to the defendant's social security number as obtained from other records. N.T. 50. The connection of this exhibit to the defendant is clear, and, therefore, the defendant's argument is without factual basis.

As to exhibit eight, we agree with the defendant that its admission may have been improper because there was no way to

show that it was connected to the defendant. If any error was committed, however, we believe it was harmless. The only purpose served by the exhibit was to circumstantially demonstrate that the defendant knew what was going on in the room where the envelope was found. In view of exhibit seven and the other circumstantial evidence adduced at trial to establish this element of the offense, the admission of exhibit eight constituted at most cumulative evidence and was harmless beyond a reasonable doubt.

As the final trial errors, the defendant assigns the failure of the trial court to charge on seven specific points. Two of the rejected points (points five and six) requested the judge to review specific portions of the evidence presented by the Commonwealth which, if believed by the jury, would have been favorable to the defendant. Such instructions are not obligatory and there was no error in their refusal. **Commonwealth v. Leitch,** 185 Pa. Superior Ct. 261, 267-68, 137 A.2d 909, 913 (1958). The evidence presented in this trial was neither extensive nor confusing. The trial judge appropriately emphasized the importance for the jury to take the facts as they remembered them from the testimony given. We believe the instructions were sufficient in this respect.

Points one, two, three, and four deal essentially with the matter of evaluating the credibility of witnesses. Upon review of the court's charge, we read:

> So you have to decide whether the testimony is credible. . . .That does not mean necessarily that it is a question of whether a witness is telling the truth, or whether a witness is lying. A person may intend to tell the truth, and yet they may be mistaken. It can be through faulty recollection or poor memory, or they just didn't observe what they thought they did.
>
> . . .
>
> In assessing someone's credibility, you will have to use your common sense. You will have to evaluate their testimony. You will have to evaluate how it fits in with the overall picture,

whether it is probable or improbable, how the person impressed you as a witness. When they were on the stand, did they seem to be candid or were they evasive or do you feel that they were attempting to tell you the truth as they understood it to be. N.T. 107-08.

And later:

If you conclude that one of the witnesses testified falsely and intentionally about any fact which is necessary to your decision in this case, and for that reason alone, you may if you wish disregard everything that the witness said. However, you are not required to disregard everything the witness said for this reason. It is entirely possible that the witness testified falsely and intentionally in one respect, but truthfully about everything else. N.T. 114-15.

These statements constitute proper instructions, and although they may not be couched in the exact language requested by the defendant, there is no error. **Commonwealth v. Rose,** 449 Pa. 608, 615, 297 A.2d 122, 126 (1972).

The defendant contends that a new trial should be awarded because the verdict is against the evidence and against the weight of the evidence. Where the findings of triers of fact are supported by the record and they sustain the verdict, a motion for a new trial on this basis cannot be granted. **Commonwealth v. Dawkins,** 227 Pa. Superior Ct. 558, 322 A.2d 715 (1974). In reviewing the record upon such a motion, the Commonwealth's evidence should be accepted as correct; all reasonable inferences therefrom are to be granted to the prosecution. **Commonwealth v. Portalatin,** 223 Pa. Superior Ct. 33, 297 A.2d 144 (1972); **Commonwealth v. James,** 197 Pa. Superior Ct. 110, 177 A.2d 11 (1962). Viewed in this light, the instant record can be summarized in the following narrative. Over a period of several weeks, a police officer was able to place bets at a telephone installed on the defendant's property at Mounted Route, Enola. Upon execution of a search warrant at the house located there, the officers

discovered a substantial amount of bookmaking paraphernalia in one room in the house. A telephone located in that room was labelled with the number the officer had called to place his bets. This evidence clearly established beyond a reasonable doubt that a bookmaking operation was being conducted on the premises and thereby proved one essential element of the offense charged against the defendant. The other element of the offense--that the defendant **knowingly** allowed the premises owned by him to be used in this manner--was established almost entirely by circumstantial evidence. It consisted of evidence that the defendant's wife and another relative were identified as the persons the affiant spoke to when he placed bets. The activity was shown to be continuing in nature. The bail piece executed by the defendant (exhibit thirteen) and the testimony of the defendant's son showed the defendant resided on the property. In addition the bail piece and the testimony of the County Recorder of Deeds established the defendant as the sole owner of the property. Finally, the letter addressed to the defendant and found in the room where the illegal activity was carried on among the bookmaking records would strongly indicate that he had been in the room while it was being put to its unlawful use. This evidence taken in totality was sufficient beyond a reasonable doubt to sustain the defendant's conviction.

Alternatively, the defendant contends that a new trial is necessary because the verdict was against the law. A jury's verdict is not against the law if it is not in disobedience to the trial court's instructions. **Commonwealth v. Ashford**, 227 Pa. Superior Ct. 351, 322 A.2d 722 (1974); **Commonwealth v. Stoval**, 34 Beaver Co. L. J. 31 (1974). From what has already been said concerning the propriety of the charge and the sufficiency of the evidence, it is evident that this asserted ground is untenable.

As to the defendant's motion in arrest of judgment, we are satisfied that it too must be dismissed. To sustain such a motion "it must be determined that accepting all of the evidence and all reasonable inferences therefrom, upon which, if believed the jury could properly have based its verdict, it would be nonetheless insufficient in law to find beyond a reasonable doubt that the

[defendant] is guilty of the crime charged." **Commonwealth v. Blevins,** 453 Pa. 481, 483, 309, A.2d 421, 422 (1973). Such is not the case on the record before us.

ORDER OF COURT

AND NOW, September 10, 1976, for the reasons stated in the opinion filed this date, the defendant's motions are overruled. After submission to the court of a presentence investigation report by the probation department, the district attorney is directed to bring the defendant before the court for sentencing.

By the Court,

/s/ Dale F. Shughart
P.J.

/s/ John C. Dowling
J.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

No. 229 Criminal, 1976

COMMONWEALTH OF PENNSYLVANIA

V.

PETER SMITH

ORDER OF COURT

AND NOW, May 5, 1976, after careful consideration of the evidence and the brief filed,

The motion to suppress the evidence be and is hereby overruled.

By the Court,

/s/ Dale F. Shughart
P.J.

(See Opinion filed February 9, 1976, in Commonwealth v. Blanche Smith and John Theodore Smith, 43 and 44 Criminal 1976)

Appendix D

OPINION and ORDER OF COURT

The defendants John Theodore Smith and Blanche Smith have filed applications to suppress certain evidence seized pursuant to a search warrant issued November 21, 1975, in which they were among the individuals listed as being in control of the premises for which the warrant was issued. The warrant is challenged on the basis that probable cause was lacking for its issuance in that certain statements made in the affidavit constituted material misrepresentations by the affiant. A joint hearing has been held and both applications will be decided in this opinion.

STATEMENT AND FINDINGS OF FACT

Between September 27 and November 21, 1975, the affiant, Trooper George Wynn of the Pennsylvania State Police, was working as an undercover agent investigating gambling operations. During the investigation, he became familiar with one Robert Harry Long who supplied him with a telephone number and indicated that Pete Smith, who ran the operaion, could be reached at the number. Long also informed Trooper Wynn that two other persons named John Smith and Blanche Smith might respond to calls directed to the telephone number. On October 22, 29, 30, 31, and November 1, 3, 5, 11, 1975, Trooper Wynn called the number and placed bets with persons identifying themselves as John, Pete or Blanche. The affidavit stated:

> The affiant has heard the voices of John and Pete Smith on numerous occasions. . .[and] positively identified the voices of John & Pete Smith as belonging [to] the person(s) that accepted the horse bets on the telephone.

Through Bell Telephone Company, Trooper Wynn ascertained that the telephone was located at the premises subsequently specified in

Appendix D

the warrant and that the listing was for S. M. Graeff, c/o Pete Smith. The warrant was issued pursuant to this information collected by Trooper Wynn.

DISCUSSION

The defendants John Smith and Blanche Smith have objected to the validity of the warrant on the following grounds:

> (1) that the warrant contains a misrepresentation in that it alleges that the affiant became "acquainted with" John Smith and Blanche Smith, whereas the testimony has shown that affiant was told of the names by Robert Long and that the persons were not known to affiant except by the first names they gave over the telephone;
>
> (2) that the representation in the affidavit that the persons on the telephone identified themselves as John Smith and Blanche Smith is a material misrepresentation made to encourage the district justice to execute the warrant, since the persons answering the phones identified themselves only by the first names of John and Blanche;
>
> (3) that the reliability of Robert Harry Long as an informant was not established.

The defendant John Smith further asserts a fourth misrepresentation in that the statement in the affidavit that "the affiant has heard the voices(s) of John. . .Smith on numerous occasions during his investigation" is not true.

In regard to the objection that affiant was not in fact "acquainted with" John and Blanche Smith, the officer testified at the suppression hearing that although he did not personally know the defendants, he had become familiar with the names John Smith and Blanche Smith through Robert Long. Long's information was corroborated by the first-name telephone identifications given to the

affiant and was further supported by the information from the telephone company that the phone was listed c/o Pete Smith. In addition, the affiant stated in the affidavit that he positively identified the voice of John Smith as being the person to whom he spoke on the telephone. These circumstances collectively certainly constituted sufficient reason for the officer to believe that the individuals he spoke to on the telephone were in fact John Smith and Blanche Smith. Therefore, in view of the officer's clarification at the hearing of the use of the term "acquainted with" we do not consider this to be a misrepresentation in the affidavit, since it is clear he was familiar with the names and voices of the defendants through the telephone contacts with them. In any event, knowledge of the last names of the persons who took the bets was unnecessary for the issuance of the warrant and constituted surplusage.

For similar reasons, we cannot agree with defendants that the statement in the affidavit that the individuals identified themselves as John Smith and Blanche Smith was a material misrepresentation. Although the officer testified that the individuals identified themselves by first name only, the circumstances summarized above constituted reason sufficient for him to believe that they were in fact the persons with the surname Smith.

Defendants' third objection suggests that the reliability of Robert Long as an informant was not established and that, therefore, the information obtained from him could not validly be used to obtain the warrant. It is clear that the only information obtained from Long was the telephone number and the names of the persons that could be expected to answer the number. Long's information that gambling bets could be placed with these individuals was corroborated by the officer's own personal calls and conversations with the persons identifying themselves as John and Blanche. All of Long's information, including the fact that the surname was Smith, was corroborated independently by the officer from his investigation. In view of the independent verification of the information obtained from Long and the recitation in the affidavit that Long was incriminating himself by providing the information to the officer, we conclude that the reliability of the information was sufficiently established as

required by law. **See Commonwealth v. Rose**, 211 Pa. Superior Ct. 295, 235 A.2d 462 (1967).

Finally, the defendant John Smith asserts that the statement in the affidavit that the officer positively identified the voice of John Smith is not true and states that this assertion was supported by testimony at the preliminary hearing. There are no facts in the record before us to support this contention and it must therefore be disregarded.

We conclude that the defendants' attacks on the credibility of the information in the affidavit for the search warrant are entirely without merit and that, therefore, probable cause for the issuance is established.

ORDER OF COURT

AND NOW, February 9, 1976, for the reasons set forth, the application to suppress filed in behalf of each defendant be and is hereby dismissed.

By the Court,

/s/ Dale F. Shughart

P.J.